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CHARLES ELMORE CROPLEY
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In the

Supreme Court of the United States

No. 252 October Term, 1949

Lafayette M. Gray (also known as L. M. Gray),
petitioner,

v.

United States of America,
respondent

PETITION

for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

and

BRIEF in Support Thereof

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In the

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No. October Term, 1949.

Lafayette M. Gray, (also known as L. M. Gray),
petitioner,
v.
United States of America,
respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Lafayette M. Gray, respectfully prays for a writ of certiorari

to review the decision, order and judgment (R.p. 489) of the United States Court of Appeals for the Eighth Circuit, made and entered in the above-entitled case on June 6, 1949;

and/or

to review *that part* of the decision (R.pp. 448-460) and judgment (R.p. 460) of said Court dated April 18, 1949 which was *entered on June 6, 1949, nunc pro tunc;* namely, the June 6, 1949 modification (R.p 489) of the April 18, 1949 judgment (R.p. 460) striking (on June 6, 1949) the words: *"discharge the accused"* (from that Court's original opinion

and judgment of April 18, 1949) and substituting in place thereof (on June 6, 1949) the words: "*grant a new trial*".*

On June 15, 1949 the United States Court of Appeals for the Eighth Circuit entered an Order (R.pp. 489, 490) herein granting petitioner an extension to and including July 6, 1949, within which to file a petition for rehearing. Such petition was filed on July 5, 1949 (R.pp. 491-510) and was denied on July 14, 1949 (R.p. 511).

A certified transcript of the record in the case, including the proceedings in the Court of Appeals, is furnished herewith, in acordance with Rule 38 of this Court.

Summary and Short Statement of the Matter Involved

The present suit is a criminal action brought in the United States District Court for the District of Minnesota, against petitioner, by Information filed July 21, 1947, charging petitioner, in four separate Counts, with the violation of the Federal Food, Drug and Cosmetic Act (enacted June 25, 1938) being Chapter 9 of Title 21 of the United States Code (21 U.S.C. 352 [a]. [e] & [f]).

On December 18, 1947, defendant filed a motion (R.pp. 6, 7) to dismiss the action, on the ground that in each Count of the Information the defendant is charged with more than one offense.

On January 24, 1948, the District Court filed its order (R.pp. 8, 9) denying, as to each of the four Counts, defendant's motion to dismiss the action; the District Court's pre-trial (and pre-arraignment) holding being that the Information was a valid one.

(On appeal, the Court of Appeals concurred in the District Court's pre-trial holding, and likewise held that the Information was a valid one; R.p. 451, lines 21 to 32.)

* NOTE: All emphasis herein supplied by petitioner's counsel unless otherwise indicated.

On March 8, 1948, defendant was arraigned and entered a plea of "Not Guilty" (R.p. 10). Defendant was thereupon tried, on said Information (R.pp. 1-6), before the trial court and a jury; the trial commencing on March 10, 1948 (R.p. 12) and ending on March 27, 1948 (R.p. 363.

The trial judge dismissed Count IV of the Information during the trial (R.p. 384).

At the close of all the evidence, defendant moved for judgment of acquittal on the grounds stated in the written motion filed at that time (R.pp. 318, 364-366). This motion was denied (R.p. 318).

The trial judge did *not* submit to the jury the usual forms of verdict requiring the jury to find defendant "guilty" or "not guilty" *only once* as to each of Counts I, II and III (the only Counts submitted to the Jury: R.pp. 11, 12).

On the contrary, the trial judge submitted to the jury three forms of verdicts which required it to find defendant "not guilty" or "guilty" three times as to Count I, twice as to Count II and twice as to Count III, instead of only once as to each count (R.pp. 11, 12, 347-349).

Immediately upon the completion of the trial judge's charge to the jury, the defendant took specific and timely exception to the action of the trial court in submitting verdict forms to the jury requiring multiple responses to each count (R.p. 350, and see Court of Appeals opinion at R.p. 455, lines 5 *et seq.*).

(The fact that the first form of verdict [R.pp. 347-8] as to Count I and the third form of verdict [R.pp. 348-9] as to Count III required the jury, inter alia, to bring in a verdict of "guilty" or "not guilty" of a false and misleading "**label**"[1], instead of false and misleading "**labeling**"[2], i. e. as contained in defend-

[1] as defined by sub-division "k" of Section 321 of Title 21 of the United States Code; which false and misleading "**label**" was *not* charged in the Information.

[2] as defined by sub-division "m" of Section 321 of Title 21 of the United States Code.

ant's letters[1], was not noticed by defendant's counsel[2] upon the mere hearing of the forms of the proposed verdicts read by the trial judge to the jury [R.pp. 347-349 and R.pp. 506-7]).

Notwithstanding defendant's exceptions (R.p. 350), the trial judge submitted said multiple forms of verdicts to the jury.

After the jury had been out for 27½ hours, namely, from 11:30 a. m on March 26, 1948 (R.p. 353) to 3 p. m. on March 27, 1948 (R.p. 363), it returned the three verdict-forms; and the returned verdicts found defendant "**not guilty**" **five times** and "guilty" twice, namely:

(1) "*not guilty*"[3] *twice* and "guilty"[4] once, as to Count I
(2) "*not guilty*"[3] *twice,* as to Count II, and
(3) "*not guilty*"[3] *once* and "guilty"[4] once, as to Count III.

On April 1, 1948, defendant (under Rule 29 of the Federal Rules of Criminal Proceedure) filed his written motion (R.pp. 366-9) for judgment of acquittal on the grounds stated therein. This motion, as amended (R.pp. 370-1), was heard by the trial court on May 3, 1948 (R.p. 371) and was denied with an opinion and by an order filed May 11, 1948 (R.pp. 372-380).

Judgment, adjudging defendant guilty and convicted on Counts I and III of the Information, and sentencing him, was entered by the District Court on June 1, 1948 (R.pp. 380, 381).

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[1] charged in the Information.

[2] and, presumably, was likewise *not* noticed by the government's attorney nor by the trial judge even though the trial judge presumably gave his oral reading of the verdict-forms directly from the typewritten verdict-forms which were thereafter handed to the jury.

[3] i. e. "not guilty" of failing to put the common name of the drug upon its "label" in Counts and Verdicts I, II and III and "not guilty" of "inadequate directions for use" in Counts and Verdicts I and II.

[4] i. e. "guilty" of a false and misleading "label"; an offense not charged in the Information.

On June 10, 1948 defendant appealed to the United States Court of Appeals for the Eighth Circuit from said judgment (R.pp. 382, 383) on the grounds, inter alia, that

(a) the judgment entered by the trial court was erroneous because it adjudged defendant guilty only of an offense with which he was *not* charged in any of the Counts of the Information, and

(b) the three multiple forms of separate verdicts required or permitted the jury to find defendant "guilty" or "not guilty" three times as to Count I, twice as to Count II and twice as to Count III of the Information*.

On his appeal to the Court of Appeals, defendant prayed for reversal of the judgment of the District Court as to Counts I and III of the Information; and that defendant be granted judgment of acquittal, or that the action be dismissed in accordance with defendant's motion filed December 18, 1947 (R.p. 6), and that he be discharged. In his brief filed in the Court of Appeals on December 24, 1948, under the heading "Relief Prayed For", the defendant stated:

> "On this appeal, appellant prays for reversal of the judgment of the lower court as to Counts I and III of the Information; and that appellant be granted judgment of acquittal, or that the action be dismissed in accordance with appellant's motion filed December 18, 1947 (R.pp. 6, 7), and that he be discharged". (R.p. 499);

and concluded his brief as follows:

> "For the reasons above stated, it is respectfully submitted that the judgment of the lower court should

* whereas on defendant's motion (R.p. 6) to dismiss the action, filed prior to defendant's plea, on the ground that in each Count of the Information defendant is charged with more than one offense, the District Court denied (R.p. 9, lines 17 & 18) the motion and ruled that each Count charged only one offense. On appeal, the Court of Appeals concurred in this ruling (R.p. 451, fourth line from bottom of page).

be reversed; that the defendant is entitled to judgment of acquittal or to have the action dismissed in accordance with his motion for dismissal which was denied by the lower court and, in either event, that the defendant is entitled to be discharged.

"In taking this appeal, the *defendant does not waive and expressly reserves his right to not again be tried or put in jeopardy on or for any of the charges on which he was once tried and found 'not guilty' by the jury or on which the verdicts of the jury were silent.*" (R.p. 499).

On April 18, 1949, the Court of Appeals handed down its opinion (R.pp. 448-460) reported* at 174 F.2d 919, and entered its judgment (R.p. 460) *reversing* the judgment of the District Court on *each* of the grounds ("a" and "b") set out on page 5 hereof, and remanded to the District Court with directions to set aside the judgment and *discharge the accused* (R.p. 460). In its opinion, the Court of Appeals said:

"• • • there was no verdict of guilty of false labeling within the charge of the information, the onus of the outcome may not be shifted to the appellant. *He was put in jeopardy on the charges of the several counts of the information and the jury was discharged without having rendered verdicts of guilty responding to the charges* and he is therefore entitled to have the judgment against him avoided.

Reversed and remanded with direction to set aside the judgment and discharge the accused." (R.p. 459, line 34 to p. 460, line 5).

On May 23, 1949 the government filed a Petition for Re-Argument (R.pp. 461-486) accompanied by the assistant United States attorney's "Affidavit for Correction of Record" (R.pp. 487-8).

* the Opinion, as reported at 174 F. 2d 919, is not as handed down on April 18, 1949, but is, instead, as modified by the Order (R.p. 489) of June 6, 1949.

Because of the provisions of Rule 15(a) of the United States Court of Appeals for the Eighth Circuit, providing that "no response or opposition to such petition is permissible unless specifically requested by the Court", the defendant made no response or opposition to the government's petition for reargument, no response or opposition having been requested by the Court of Appeals (R.p. 492).

On June 6, 1949, the Court of Appeals entered its order (R.p. 489) denying the government's petition for reargument, but further ordering that its original Opinion (R.p. 460) filed on April 18, 1949, be modified by striking therefrom the last sentence reading:

> "Reversed and remanded with direction to set aside the judgment and *discharge the accused*"

and substituting therefor the folowing:

> "Reversed and remanded with directions to set aside the judgment and *grant a new trial*",

and further ordering that "The judgment of this Court entered in pursuance of the opinion filed April 18, 1949, is corrected accordingly now as of then." (R.p. 489).

On July 5, 1949, defendant filed his timely* Petition for Rehearing (R.pp. 491-510) in respect to the Court of Appeals' decision (of June 6, 1949) not to discharge the defendant but instead to grant a new trial, which decision was contrary to that Court's original decision (R.pp. 448-460) of April 18, 1949 that defendant be discharged (R.p. 460). This petition was denied on July 14, 1949 (R.p. 521).

Jurisdiction.

This Court's jurisdiction is invoked under Section 1254 (1) of Title 28 of the United States Code and Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

The judgment (R.p. 460 and R.p. 489) of the Court of Appeals, which petitioner seeks to have reviewed, was

* see foregoing page 2.

made and entered on June 6, 1949[1], and petitioner's timely (R.pp. 489, 490) petition for re-hearing (R.pp. 491-510) with respect to said judgment of June 6, 1949 was denied on July 14, 1949 (R.p. 511).

The present petition for writ of certiorari is timely under Rule 37 (b)(2) of the Federal Rules of Criminal Procedure[2] in view of petitioner's timely (R.pp. 489, 490) petition for rehearing (R.pp. 491-510) filed in the Court of Appeals on July 5, 1949 (R.p. 510) in respect to the modifying order (R.p. 489) and final judgment of June 6, 1949, and in view of the established rule that the time within which a petition for writ of certiorari may be filed to review a decision and judgment of a United States Court of Appeals, does not begin to run until the denial by such United States Court of Appeals of a timely petition for re-hearing in respect to its decision for the review of which certiorari is sought:

Craig v. *United States,* 298 U.S. 637 (80 L.Ed. 1371);
Weinblatt v. *United States,* 298 U.S. 637 (80 L.Ed. 1371);
Citizen's Bank of Michigan City v. *Opperman,* 249 U.S. 448; 450 (63 L.Ed. 701, 702);
Chicago Great Western Railroad Co. v. *Bascham,* 249 U.S. 164, 166-7 (63 L.Ed. 534, 535-6);
United States v. *Seminole Nation,* 299 U.S. 417, 421 (81 L.Ed. 316, 318);
Ekberg v. *United States,* 167 F.2d. 380, 383 (CCA-1);
Chin Gum v. *United States,* 150 F.2d. 765, 766 (CCA-1).

The United States Court of Appeals for the Eighth Circuit has stayed its mandate, by its order entered on

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[1] which is the date of entry of the modifying order (R.p. 489)and final judgment of the Court of Appeals by which it modified its earlier judgment (R.p. 460) of April 18, 1949, which earlier judgment (as made and entered on April 18, 1949 and prior to such modification thereof as was made and entered on June 6, 1949) was entirely satisfactory to petitioner.

[2] Rule 37 (b-2) of the Rules of Criminal Procedure provides, inter alia: "Petition for writ of certiorari may be made within 30 days after entry of judgment or within such further time not exceeding 30 days as the Court or a justice thereof for cause shown may fix within the 30-day period following judgment."

July 19, 1949 (R.p. 511), to permit the filing of a Petition for Writ of Certiorari.

Petitioner seeks to have reviewed *only* that part of the final Judgment of the Court of Apepals entered on June 6, 1949 (R.p. 489) which fails to discharge defendant and which rescinds that Court's earlier original judgment of April 18, 1949 discharging defendant (R.p. 460), and which directs the granting of a new trial not sought by either party (instead of discharging the defendant as *correctly* directed by that Court's original judgment of April 18, 1949).

Questions Presented.

Question 1: Was not defendant entitled to be discharged in accordance with the original opinion (R.pp. 448-460) and judgment (R.p. 460) of the Court of Appeals (entered on April 18, 1949), rather than to be granted only a new trial[1] as later directed by the subsequent Order[2] of the Court of Appeals entered on June 6, 1949?

Question 2: Is not the Court of Appeals' Order[2] (R.p. 489) and Judgment[2] of June 6, 1949

(a) violative of the *double jeopardy* provision of the Fifth Amendment of the Constitution of the United States, and

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[1] Defendant did not ask the Court of Appeals for a new trial. On the contrary defendant expressly reserved his right to *not* again be tried or put in jeopardy on or for any of the charges for which he was once tried and found "not guilty" by the jury or on which the verdicts of the jury were silent (R.p. 499). The government's brief filed February 11, 1949 in the Court of Appeals likewise did *not* ask the Court of Appeals for a new trial (the government merely asked for an affirmance of the Judgment of conviction on Counts I and III).

[2] This order and judgment (made on the government's Petition for Re-Argument) while, in terms, denying the government's Petition for Re-Argument, nevertheless made a vital and far-reaching modification of the appellate court's *correct original opinion and judgment*, without affording defendant any opportunity to respond to the government's Petition for Re-Argument.

(b) in conflict with this Court's decisions in *Selvester* v. *United States*[1], 170 U. S. 262, 269; *Dealy* v. *United States*[1], 152 U. S. 539, 542; *United States* v. *Buzzo*[1], 85 U.S. 125; and *Nielsen* v. *United States*[1], 131 U. S. 176?

Question 3: May the Court of Appeals reverse[2] its correct original opinion and judgment (R.p. 460) favorable to defendant-appellant, upon plaintiff-appellee's subsequent "Petition for Re-Argument" (R.pp. 461-486)

(a) upon alleged facts advanced for the first time upon plaintiff-appellee's "Petition for Re-Argument" through an "Affidavit for Correction of Record" (R.pp. 487, 488) annexed to such "Petition for Re-Argument"; which alleged facts concededly do not appear either in the printed or typewritten Record on appeal and are concededly not supported even by the original Transcript nor by the court-reporter's stenographic notes, and which alleged facts are squarely contradicted by the printed Record on appeal (R.pp. 275, 276),

(b) without affording defendant-appellant any opportunity either to respond to plaintiff-appellee's

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[1] which decisions of this Court are to the effect that if upon a trial on a valid indictment or information, a conviction might have been had but was not, there was an implied acquittal, and the jury having been discharged without having found defendant guilty of any offense charged, the defendant must be discharged.

[2] while the appellate court's Order and Judgment of June 6, 1949, (in respect to which a Petition for Writ of Certiorari is hereby sought), in terms, denies plaintiff-appellee's "Petition for Re-Argument", it is, nevertheless, a substantial reversal of the appellate court's correct original judgment, in that it changes the original Judgment from a direction to discharge the defendant to a direction granting a new trial which was not sought by either party (which substantial reversal of the correct original Judgment, the subsequent Order of June 6, 1949 does without any change of the appellate court's original Opinion that the Judgment of conviction entered by the trial court must be vacated because it adjudges defendant guilty only of an offense not charged in the Information and that the defendant had been put in jeopardy on the charges of the several Counts of the Information and the jury had been discharged without having rendered verdicts of "guilty" responding to such charges).

"Petition for Re-Argument" or to plaintiff-appellee's "Affidavit for Correction of Record" or to be otherwise heard or have his day in court in respect to such reversal of the appellate court's own earlier correct original opinion and judgment?

Reasons Relied Upon for Allowance of Writ of Certiorari.

1. By its Order (R.p. 489) and Judgment of June 6, 1949, the Court of Appeals has decided important questions of federal and constitutional law (namely *Questions 1 and 2, above*) in a way which violates the *double jeopardy* provision of the Fifth Amendment of the Constitution of the United States and in a way which is in conflict with the following applicable decisions of this Court, and in a way which so far departs from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision, as shown by the following applicable decisions of this Court and of the Court of Appeals of the Eighth and other Circuits and of State appellate courts, in that *the Court of Appeals, in the case at bar, has directed a new trial (not sought by either party) in face of its own unaltered prior original finding, holding and decision that defendant had been in jeopardy on the charges of the several Counts of a valid Information and that the jury was discharged without having rendered verdicts of guilty responding to the several charges* (but the jury having found defendant "not guilty" *five times*):

Selvester v. *United States*, 170 U. S. 262, 269;
Dealy v. *United States*, 152 U. S. 539;
United States v. *Buzzo*, 85 U. S. 125;
Nielsen v. *United States*, 131 U. S. 176;
Gray v. *United States*, 14 F. 2d 366, 368 (CCA-8);
Commonwealth v. *Komatowski*, 347 Pa. 445, 32 Atl. (2d) 905;
Walter, et al v. *Commonwealth*, 44 Pa. 135;

Ex Parte Muse, 56 Okl. Cr. 232; 37 Pac. (2d) 317;
People v. *Arnarez,* 68 Cal. App. 645; 230 Pac. 193;
State v. *Yow,* 227 N.C. 585; 42 S.E. (2d) 661;
State v. *Ward,* 147 La. 1083; 86 So. 552.

2. The Court of Appeals has decided an important question of federal law (namely *Question* 3, above) in a way which violates the *due process* provision of the Fifth Amendment of the Constitution of the United States and in a way which is in conflict with the following applicable decisions of this Court and in a way which so far departs from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision, as shown by the following applicable decisions of this Court and several United States Courts of Appeal and District Courts, in that *the appellate court's order and judgment of June 6, 1949, in effect, reverses that Court's earlier original judgment of April 18, 1949.*

(a) upon alleged facts concededly *de hors* the record and, indeed, squarely contradicted by the record,

(b) without affording defendant-appellant (petitioner at bar) any opportunity to respond to plaintiff-appellee's "Petition for Re-Argument" and *without giving defendant-appellant* (petitioner at bar) *his day in court* with respect to such reversal of the appellate court's own earlier original judgment wholly favorable to defendant-appellant:

Rule 39 (b)(1) of the Federal Rules of Criminal Procedure;
Rule 75 (h) of the Federal Rules of Civil Procedure;
Rule 36 of the Federal Rules of Criminal Procedure;
Sibbach v. *Wilson & Co.,* 312 U. S. 1 (61 S.Ct. 422, 427);
John R. Alley & Co. v. *Federal National Bank,* 124 F. 2d. 995, 998 (CCA 10);
Nash v. *Raun,* 67 F. Supp. 212, 217 (DC WD Pa);
Dreslin v. *Phillips,* 279 Fed. 303 (App. D. C.);

Clawans v. *White*, 112 F. 2d. 189 (App. D. C.);
Century Indemnity Co. v. *Arnold*, 153 F. 2d 531 (CCA-2);
Petitions of Rudder, 159 F. 2d 695, 696 (CCA-2);
Reynolds v. *Imlay*, 118 F. 2d 53 (App. DC);
Boucher Inventions, Ltd. v. *Sola Electric Co.*, 1 F.R.D. 631 (D.C., D. of C.);
Vizen v. *Great Lakes Dredge & Dock Co.*, 11 Fed. Rules Serv. 75h-22, Case 1 (D.C. N.D. Ohio);
Daniels v. *Goldberg*, 12 Fed. Rules Serv. 60b-34, Case 1 (DC SD NY);
Heath v. *Helmick*, 173 F. 2d 156 (CA 9);
Wertz v. *National City Bank*, 115 F. 2d 65, 67 (CCA-7);
Marvin's Credit, Inc. v. *Hall*, 129 F. 2nd 57 (App. D.C.);
Moore's Federal Practice, Vol. 3 § 75.09 (page 385 of 1948 Supplement).

Conclusion.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court, on a date to be designated, a full and complete transcript of the record of all proceedings had in said Court of Appeals in this cause, to the end that this cause may be reviewed and determined by this Court and that the aforesaid Order and Judgment made and entered by said Court of Appeals on June 6, 1949 may be reversed and the earlier original Judgment made and entered by that court on April 18, 1949 may be reinstated as originally made and entered.

Lafayette M. Gray,
petitioner
by C. A. Taney, Jr.,
G. Aaron Youngquist,
Leonard L. Kalish,
attorneys for petitioner

The undersigned hereby certify that the foregoing petition is in their opinion well founded, and that the case is one in which the petitioner's prayer should be granted by this Court.

C. A. Taney, Jr.

G. Aaron Youngquist

Leonard L. Kalish

attorneys for petitioner

Brief in Support of Petition for Writ of Certiorari

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

(Unless otherwise indicated all emphasis herein is supplied by petitioner's counsel.)

The Opinions and Judgments of the Courts below

Opinion and Judgment of the District Court.

The District Court's Opinion of May 11, 1948, denying defendant's motion for judgment of acquittal, is reproduced on pages 372 to 380, inclusive, of the printed Record.

The District Court's judgment of conviction dated June 1, 1948 is reproduced on pages 380-1 of the printed Record.

Court of Appeals' Opinion and Judgment of April 18, 1949.

The reversing Opinion dated April 18, 1949 of the United States Court of Appeals for the 8th Circuit (174 F. 2d 919) is reproduced at pages 448 to 460, inclusive, of the printed Record. As handed down on April 18, 1949, the last line of the aforesaid Opinion (R.p. 460) concluded with the words "discharge the accused".

The line drawn through the words "discharge the accused" (R.p. 460) and the substitution of the words "grant a new trial", in the last line of the Opinion (R.p. 460) were made by that Court's modifying Order and final Judgment of June 6, 1949 (R.p. 489).

The reversing Judgment dated April 18, 1949 of the Court of Appeals is reproduced at page 460 of the printed Record. As originally made and entered on April 18, 1949, the last line of said Judgment (R.p. 460) concluded with the words "discharge the accused".

The line drawn through the words "discharge the accused" and the substitution of the words "grant a new trial" in the last line of said appellate Judgment (R.p. 460) were made by that Court's modifying Order and final Judgment of June 6, 1949 (R.p. 489).

Appellate Order and Final Judgment of June 6, 1949 (to review which, certiorari is sought)

The modifying Order and final Judgment of June 6, 1949 of the Court of Appeals is reproduced at page 489 of the printed Record.

Jurisdiction

The date of the Order and final Judgment (R.p. 489) of the United States Court of Appeals for the 8th Circuit (to be reviewed) is June 6, 1949.

Defendant-appellant's (petitioner's) timely Petition for Re-Hearing (in respect to said Order and final Judgment of June 6, 1949) was denied on July 14, 1949.

Jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the United States Code and Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

For the timeliness of the present Petition for Writ of Certiorari, see page 8 of the foregoing Petition.

Statement of the Case.

The Summary and Short Statement of the Matter Involved on pages 2 to 7, inclusive, of the foregoing Petition is believed to be an adequate Statement of the Case.

Specification of Errors.

The reasons for the allowance of the Writ of Certiorari, as set out on pages 11 to 13, inclusive, of the foregoing Petition, are believed to be an adequate Specification of Errors.

Summary of Argument.

Argument-Point 1:

a) The original Opinion and Judgment entered by the Court of Appeals on April 18, 1949, directing that defendant be discharged, were correct, and

b) that Court's modifying Order (R.p. 489) of June 6, 1949 was erroneous because a new trial was not sought by either party and represents double jeopardy to defendant because:— he was fully tried on a valid Information and the jury returned verdicts finding defendant "not guilty" *five times* and was thereafter discharged without finding defendant guilty of any offense charged in the Information.

Argument-Point 2:

The Court of Appeals (by its Order of June 6, 1949) erred in rescinding its original Judgment (entered April 18, 1949) discharging defendant, and in directing a new trial, *upon the assistant United States attorney's affidavit of alleged facts not of record and, indeed, contradicted by the Record,* without giving defendant an opportunity to respond under Rule 15(a) of that Court.

Argument.

Argument of Point 1:

Defendant Convicted Only of Offense with Which He Was Not Charged

"Label" and "Labeling".

In considering and deciding this case, the Court of Appeals properly observed (R.pp. 456-457) the distinction between the statutory definitions of the terms *"label"* and *"labeling"*. They are distinctively defined by sub-divisions (k) and (m) of Section 321 of Title 21, United States Code, as follows:

> "(k) The term "label" means a display of written, printed, or graphic matter upon the immediate container of any article;
>
> . . . . . .
>
> "(m) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."

The Information in the case at bar does *not* charge defendant with an interstate shipment bearing a *"label"* which was false or misleading. It *does* charge him, in Count I, with an interstate shipment made with an accompanying *letter* containing the statement quoted in the Information, which it is alleged was false and misleading within the meaning of 21 U. S. C. 352 (a) which provides that "A drug or device shall be deemed to be mis-branded (a) If its *labeling* is false or misleading in any particular" (R. last two lines on p. 1 and first 25 lines on p. 2). Similarly, in Count III, the Information charges defendant with an interstate shipment made with an accompanying *letter* containing the alleged false and misleading statement quoted in the Information (R.pp. 3, 4). Sending such letters is the sum total of everything false or misleading that is charged in either Count I or Count III of the Information (the only ones here involved).

As commented by the trial court in its order denying defendant's motion for judgment of acquittal (R.p. 377):

> "There was no contention that the label affixed to the carton itself contained any false and misleading statements."

Such *letters* were *"labeling"* as defined by 21 U. S. C. 321 (m); but neither of them was a *"label"* as defined by 21 U. S. C. 321 (k).

Yet, the verdicts of the jury, as to Counts I and III, found defendant "guilty" *only* of "misbranding by introducing into interstate commerce a drug, to-wit, Powdr-X, with a *label* which was false and misleading;" (R.p. 11, 12). In other words the jury found defendant "guilty" *only* of shipping his product in interstate commerce with "a display of written, printed, or graphic matter *upon the immediate container,"* an offense with which defendant was not charged in the Information and in support of which there was no evidence.

Such verdicts of guilty, and also the judgment (R.p. 380, 381) entered pursuant thereto, are not responsive to and do not cover any of the offenses charged in the Information.

Defendant is entitled to be discharged (not merely to a new trial which was *not* sought).

Defendant was fully tried on a valid information. (See Opinion of Court of Appeals filed April 18, 1949 at R.p. 451, fourth line from bottom of page, and R.p. 459).

Defendant was not found "guilty" and was not convicted of any of the charges alleged in the information.

The jury's verdicts found defendant "not guilty" *five times,* namely on two of the charges of Count I, on both charges of Count II and on one of the charges of Count III of the information.

The jury found him "guilty" (in both Counts I and III) only of "misbranding by introducing into interstate commerce a drug, to-wit, Powdr-X, with a *label* which was false and misleading," an offense with which defendant was not charged in the information. The trial court entered judgment in accordance with such verdicts. (See Opinion of Court of Appeals filed April 18, 1949 at R.pp. 449-460).

The verdicts of the jury were silent as to whether the defendant was "guilty" or "not guilty" of misbranding by introducing into interstate commerce a drug with *labeling* (consisting of certain personal letters written by defendant) which was false and misleading, with which Counts I and III charged the defendant. (See Opinion of Court of Appeals filed April 18, 1949 at R.pp. 459-460).

As stated by the Court of Appeals in its original Opinion filed on April 18, 1949 (which it never modified, in this respect):

> ". . . there was no verdict of guilty of false labeling within the charge of the information, the onus of the outcome may not be shifted to the appellant. *He was put in jeopardy on the charges of the several counts of the information and the jury was discharged without having rendered verdicts of guilty responding to the charges* and he is therefore entitled to have the judgment against him avoided." (R.pp. 459-460).

The original decision and judgment of the Court of Appeals entered on April 18, 1949, by which it "Reversed and remanded with direction to set aside the judgment and *discharge the accused*" was manifestly correct because the verdicts were *silent* as to any charge that petitioner shipped his product in interstate commerce with an accompanying letter, i. e., "with *labeling*" which was false and misleading; by reason of which the verdicts were equivalent to verdicts of "Not Guilty" as to such charges. That is the effect of the decision of this Court in *Dealy* v. *United States,* 152 U. S. 539, 542 in which this court said:

> ". . . the sixteenth count was not referred to in the verdict. It may have been simply overlooked by the jury. Be that as it may, the discharge of the jury under the circumstances was doubtless equivalent to a verdict of not guilty as to that count."

In *Selvester* v. *United States,* 170 U. S. 262, 269, this Court, citing the *Dealy* case with approval, said:

> "Doubtless where a jury, although convicting as to some, are silent as to other counts in an indictment, and are discharged without the consent of the accused, as was the fact in the Dealy case, the effect of such discharge is *'equivalent to acquittal'* because, as the record affords no adequate legal cause for the discharge of the jury, *any further attempt to prosecute would amount to a second jeopardy,* as to the charge with reference to which the jury has been silent."

In the case at bar, the petitioner did not consent to the discharge of the jury, nor was his consent asked. Under the *Dealy* and *Selvester* cases, the silence of the jury as to the charges that petitioner shipped his product in interstate commerce with accompanying letters, i. e., "with *labeling*" which were false and misleading, is equivalent to acquittal on such charges.

This Court, in *Nielsen* v. *United States,* 131 U. S. 176, 33 L.Ed. 118, 122, said:

> "If a conviction might have been had, and was not, there was an implied acquittal."

In *Gray* v. *United States* (C. A. 8th), 15 F. (2d) 366, 368, the court followed this Court's decision in *Nielsen* v. *United States, supra,* and referred to the above-quoted language of this Court on the doctrine of *implied acquittal.*

Petitioner's contentions on this Point are supported by numerous other decisions cited below holding, among other things, that a verdict must be responsive to and cover the offense charged in the indictment or information, and that a verdict which is not so responsive to the offense charged, and does not find defendant "guilty" of any offense charged, is the equivalent of an acquittal and requires the discharge of the defendant.

In *United States* v. *Buzzo,* 85 U. S. 125, defendant was charged with issuing certain drafts without the same being duly stamped and with intent to evade the provisions of the Internal Revenue Act. The verdict stated that the "drafts were issued without being stamped, but it did not state that it was done with intent to evade the provisions of the Act." This Court dismissed the case, saying:

> "An imperfect verdict, or one on which no judgment can be rendered, must be set aside, and a venire de novo awarded . . . *This case must, therefore, be dismissed.*"

In *Commonwealth* v. *Komatowski,* 347 Pa. 445, 32 Atl. (2d) 905, defendant was indicted for murder; the jury returned a verdict finding defendant "guilty of murder in the third degree," a crime unknown to the law of Pennsylvania. In reversing the judgment and ordering defendant discharged, the Supreme Court of Pennsylvania said, among other things:

"The most peculiar thing about this case is the verdict, and its irregularity is so at variance with the very fundamentals of 'due process of law,' that it requires the discharge of the defendant and makes unnecessary the discussion of any other point raised. . . .

"Since the defendant has the constitutional right 'to demand the nature and cause of the accusation against him,' . . . it follows that he cannot be convicted of an offense which is not the accusation made against him or any constituent thereof. . . .

"No authority is needed to sustain the proposition that a defendant cannot be legally convicted of a crime, neither charged in the indictment, nor a necessary constituent of any crime so charged, . . ."

In the *Komatowski* case, the Supreme Court of Pennsylvania referred to the earlier case of *Walters, et al,* v. *Commonwealth,* 44 Pa. 135, in which defendants were charged with murder and voluntary manslaughter and were found guilty by the jury of only involuntary manslaughter; and the Court quoted with approval from the Walters case as follows:

"The prisoners have been acquitted by the verdict of all crimes charged in the indictment and convicted of a charge not made in or embraced by it. We will, therefore, simply reverse, *for no new trial could be ordered in such a case.*"

In *Ex Parte Muse,* 65 Okl. Cr. 232, 37 Pac. (2d) 317 (a habeas corpus proceeding) the information had charged defendants with "burglary in the second degree" and the jury found them "guilty of grand larceny." In holding that the judgment of the lower court, sentencing defendants on the verdict, was void and that defendants were entitled to be discharged, the appellate court said:

"The judgment must be based on the verdict of the jury, and the verdict of the jury must be respon-

sive to the issues joined. The verdict in this case has not been set aside. The petitioners *having been in jeopardy, they cannot again be tried on this information.*"

In *People* v. *Arnarez,* 68 Cal. App. 645, 230 Pac. 193, defendant was charged with the offense of "unlawfully and knowingly manufacturing intoxicating liquor"; and the jury's verdict found him "guilty of the crime and unlawfully having in his possession intoxicating liquor, included within said charge of unlawfully manufacturing intoxicating liquor in violation of the Wright Act as charged in the Information"; pursuant to which verdict judgment of conviction was pronounced by the lower court. In reversing the lower court, the appellate court held that the verdict was not responsive to the offense charged in the Information; that the verdict of the jury and the judgment of the lower court were mere nullities; that *there could be no retrial of the issue attempted to be decided by such verdict and judgment;* and that if an attempt were made to try the defendant a second time, his plea of having been once in jeopardy for the same offense should be sustained.

In *State* v. *Yow,* 227 N.C. 585, 42 S.E. (2d) 661, defendant was indicted for "larceny of a pistol"; there was a second count charging defendant "with receiving the stolen pistol knowing it to have been stolen." The jury returned a verdict "guilty of receiving stolen goods." Upon that verdict, judgment was rendered imposing sentence. In reversing the lower court, the Supreme Court of North Carolina held that the *failure of the jury to find the defendant guilty of larceny amounted to an acquittal on that charge* and that the verdict "guilty of receiving stolen goods" was insufficient to support the judgment on the second count.

In *State* v. *Ward,* 147 La. 1083, 86 So. 552, defendant was charged with burglary in the nighttime; the jury found him guilty of "burglary in the daytime"; the appellate court held that the verdict was not responsive

to the charge and set aside the judgment and sentence and *ordered the defendant discharged.*

In the case at bar, since "there was no verdict of guilty of false labeling within the charge of the information", and since the petitioner "was put in jeopardy on the charges of the several counts of the information and the jury was discharged without having rendered verdicts of guilty responding to the charges" (as stated in the Opinion of the Court of Appeals filed herein on April 18, 1949: R.pp. 459-460), and since the effect of such discharge of the jury "is equivalent to acquittal" and since "any further attempt to prosecute would amount to a second jeopardy, as to the charge with reference to which the jury has been silent" (as stated by this court in the *Selvester* case, *supra*), the petitioner should have been discharged in accordance with the original Opinion of the Court of Appeals filed on April 18, 1949. At the very least, under the rule of this court in the *Buzzo* case, *supra*, the Court of Appeals should have reversed and remanded this case with directions to the trial court to set aside the judgment *and dismiss the case.*

Since it is clear that petitioner "was put in jeopardy on the charges of the several counts of the information" and that "any further attempt to prosecute would amount to a second jeopardy", petitioner should not be subjected to the burden and expense of another trial, and perhaps of another appeal to the Court of Appeals, in order to establish his defense of former jeopardy.

Petitioner has not waived his defense of former jeopardy.

As stated by the trial court (R.p. 372) in its order denying defendant's motion for judgment of acquittal, petitioner withdrew his motion for new trial. Petitioner's counsel withdrew the motion for new trial because petitioner did not want a new trial and because his counsel believed that he was entitled to judgment of acquittal.

At no time in the Court of Appeals did petitioner ask for a new trial.

Under the heading "Relief Prayed For" on page 16 of petitioner's brief, filed in the Court of Appeals on or about December 24, 1948, petitioner said:

> "On this appeal, appellant prays for reversal of the judgment of the lower court as to Counts I and III of the Information; and that appellant be granted judgment of acquittal, or that the action be dismissed in accordance with appellant's motion filed December 18, 1947 (R. 6, 7), and that he be discharged." (R.p. 499);

and petitioner concluded his brief as follows:

> "For the reasons above stated, it is respectfully submitted that the judgment of the lower court should be reversed; that the defendant is entitled to judgment of acquittal or to have the action dismissed in accordance with his motion for dismissal which was denied by the lower court and, in either event, that the defendant is entitled to be discharged."
>
> "In taking this appeal, the defendant does not waive and expressly reserves his right to not again be tried or put in jeopardy on or for any of the charges on which he was once tried and found 'not guilty' by the jury or on which the verdicts of the jury were silent." (R.p. 499).

In the light of these circumstances, it is clear that petitioner never waived his defense of former jeopardy.

The fundamental violation of the *double jeopardy* provision of the Fifth Amendment of the Constitution by the appellate court's modifying Order (R.p. 489) of June 6, 1949, and the conflict between such modifying Order and this Court's above-cited decisions, and the appellate court's departure from the usual and accepted course of judicial proceedings (by directing a new trial instead of discharging defendant), is further emphasized by the fact that the Court of Appeals directed the granting of a new trial on two Counts on which the jury's

verdict found defendant *"not guilty" three times* (i. e. "not guilty" twice as to Count I and "not guilty" once as to Count III).

Thus, not only was there an implied acquittal as to each of these two Counts by reason of the fact that the jury was discharged after full trial on a valid information, without having found defendant guilty of any offense charged in the information, but, indeed, the returned verdicts found defendant *"not guilty" three times* on two counts as to which the appellate court's erroneous modifying Order (R.p. 489) of June 6, 1949 directs the granting of a new trial not sought by either party.

Thus, even without regard to the implied acquittal, how can defendant be re-tried on Counts I and III in view of the fact that the jury found defendant *"not guilty" three times* on these two counts?

In conclusion, it is therefore respectfully submitted that the modifying order entered by the Court of Appeals on June 6, 1949 is a violation of the double jeopardy provision of the Fifth Amendment of the Constitution of the United States in conflict with the above-cited decisions of this and other courts and so far departs from the usual and accepted course of judicial proceedings, as shown by the above-cited and quoted decisions, as to justify this Court's exercise of its power of supervision and the grant of writ of certiorari.

Argument of Point 2:

Attorney's Affidavit, in conflict with the Record, as to alleged facts *de hors* the record, not proper basis for appellate court's modifying Order of June 6, 1949

The facts relative to this point are summarized on pages 10, 11 and 12 (R.pp. 500-2) of petitioner's Petition for Re-Hearing, filed in the Court of Appeals on July 5, 1949, to which reference is hereby made.

The burden of the government attorney's Affidavit of May 18, 1949 (R.pp. 487-8) filed in the Court of Appeals on May 23, 1949 in support of the government's Petition for Re-Argument (R.pp. 461-486) was that it was defend-

ant's attorneys who misled the District Court into submitting to the jury the multiple forms of verdicts under which the jury found the defendant "not guilty" *five times* (and found the defendant "guilty" twice, but *only* of an offense *not* charged in the Information).

The government attorney's "Affidavit for Correction of Record" (R.p. 487) concedes that the matters alleged in the Affidavit for proposed "correction" of the Record, are *not* found either in the printed or typewritten Transcript of Record on appeal nor in the original typewritten Transcript in the District Court, nor in the court reporter's stenographic notes.

What is more, however, is that the printed Record on appeal clearly shows that it was the government's attorney who suggested to the trial judge the verdict-forms adopted by the trial court (R.pp. 274-276).

Thus, on March 19, 1948 (seven days before the case was submitted to the jury) the following colloquy took place between the trial judge and the government's attorney:

> "THE COURT:—How would you reflect that in the verdict?
>
> "MR. HANSEN:—Well, I imagine that the only way it could be reflected in the verdict would be by interrogatories to the jury itself, and if the jury found with respect to count 1 that there has been a false statement or that the proper name has not been used or that the directions were inadequate, they should find and return a verdict of guilty. Now that might be based on all three of them and I feel that you wouldn't have any way of knowing that excepting as you might interrogate the jury by way of interrogatories.' (R.pp. 275-6).

Thus, there is no doubt, on the Record as filed in the Court of Appeals, that it was the government's attorney who suggested the multiple forms of verdicts, in the nature of interrogatories, rather than the usual form of general verdict, namely, verdicts on which the jury is

required and permitted to find the defendant "guilty" or "not guilty" *only once* as to each count. Likewise, there is no doubt, on the Record, that defendant's attorneys took timely exception to the multiple forms of verdicts (R.p. 350).

Rule 39(b)(1) of the Federal Rules of Criminal Procedure provides:

> "The rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules."

Rule 75(h) of the Federal Rules of Civil Procedure, provides, inter alia:

> "If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the Clerk of the district Court."

Rule 36 of the Federal Rules of Criminal Procedure provides:

> "Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after notice, if any, as the court orders.

The record in the Court of Appeals was prepared and filed in accordance with the Rules above cited.

Federal Rules of Procedure have the force of Statute, as stated in *John R. Alley & Co.* v. *Federal National Bank*, 124 F. 2d 995, 998 (CCA 10):

> "The new rules have the force and effect of statutes. *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 61 S. Ct. 422, 427, 85 L. Ed. 479."

To the same effect is

Nash v. *Raun*, 67 F. Supp. 212, 217 (DC WD Pa.).

In *Dreslin* v. *Phillips*, 279 Fed. 303 (App. D.C.), the appellate court sustained the trial court's refusal to grant a verified "petition to correct record" (to change the date of entry of judgment), stating:

> "It is familiar law that a record imports absolute verity, which an affidavit by a party does not, and hence that, when a court supposed to have personal knowledge of the facts sustains the recital in a record as against the recital in an affidavit, its ruling will not be disturbed on appeal. Johnson *v.* U. S., 38 App. D.C. 347, 255 U.S. 405, 32 Sup. Ct. 748, 56 L.Ed. 1142; Col. Heights Realty Co. *v.* MacFarland, 31 App. D.C. 112."

To like effect are *Clawans* v. *White*, 112 F.2d 189 (App. D.C.) and *Century Indemnity Co.* v. *Arnold*, 153 F.2d 531 (CCA-2).

In the Commentary "Settlement of Record on Appeal", 5 Fed. Rules Serv., 75 h.2, pp. 850-1, it is stated:

> "Rule 75(h) provides that any dispute as to the correctness of the record must be settled by the district court. Presumably if the record has already been sent to the appellate court it would be necessary to move that court to remand the record to the district court."

> "If a timely motion to correct the record is not made the record is presumably conclusive on the parties." (Citing *Dreslin* v. *Phillips*, supra).

In the case of *Petitions of Rudder,* 159 F.2d 695, 696 (CCA-2), the Court refused to consider matters not included in the record on appeal, as certified by the Clerk, where no attempt was made to have the record settled by the district judge and the material was not omitted by error or accident.

In *Boucher Inventions, Ltd.* v. *Sola Electric Co.,* 1 F.R.D. 631 (D.C., D. of C.), it was held that a dispute as to the correctness of an unofficial reporter's transcript may be settled by the trial judge.

In *Heath* v. *Helmick,* 173 F.2d 156 (CA-9, decided Mar. 4, 1949), the Court, in refusing to consider a supplemental or additional record, involving documents not considered by the District Court, stated:

> "The cause must be tried here upon the record made at the original trial."

Moore's Federal Practice, Vol. 3, § 75.09 (page 385 of 1948 Supplement) states:

> "While the record may thus be corrected, even after transmission to the appellate court, it will be conclusive on the parties in the absence of a *timely* request for a correction thereof."*
>
> "Moreover, objections to the effect that the record was not prepared in accordance with the applicable Federal Rule may be dismissed where such objections are not presented promptly for the appellate court's consideration."

In *Wertz* v. *National City Bank,* 115 F.2d 65, 67 (CCA-7), the Court held to be untimely, appellee's objections to the correctness of the record which were presented for the first time in Appellee's Brief on the merits.

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* citing *Marvin's Credit, Inc.* v. *Hall,* 129 F. 2d 57 (App. D. C.) wherein it was held:

> "Where, as here, there are, for example, no inconsistencies within the transcript of record, no apparent inadequacy of the transcript, no clerical or ministerial mistake, and no charge of deliberate falsification, there cannot be the slightest doubt that we, an appellate court, must accept the transcript of record as it comes to us."

It is, therefore, respectfully submitted that under the rules and authorities the "Affidavit for Correction of Record" (R.pp. 487-8) filed in the Court of Appeals by the government's attorney on May 23, 1949 in support of the government's Petition for Re-Argument (R.pp. 461-486) was not a proper basis for the appellate court's modifying Order and final Judgment (R.p. 489) of June 6, 1949, particularly in view of the fact that petitioner was given no opportunity to respond to the government's Petition for Re-Argument or to the "Affidavit for Correction of Record", and has not had his day in court in respect to the modifying Order (R.p. 489) of June 6, 1949.

While the *due process* provisions of the Fifth Amendment and the Fourteenth Amendment of the Constitution of the United States do not, in and of themselves, require that a right of appeal shall exist (*District of Columbia* v. *Clawans,* 303 U.S. 617, 627; 81 L.Ed. 843, 847), yet as stated in *Boykin* v. *Huff,* 121 F. 2d 865, 872 (App. D.C.):

> "While due process under the Fifth Amendment, as under the Fourteenth, does not require appellate review, nevertheless when Congress creates that right it is not free from all constitutional restrictions, including the obligation not to make unreasonable discriminations."

To like effect is *Frank* v. *Mangum,* 237 U.S. 309, 327, wherein this Court stated:

> "But it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court. The laws of the state of Georgia (as will appear from decisions elsewhere cited) provide for an appeal in criminal cases to the supreme court of that state upon divers grounds, including such as those upon which it is here asserted that the trial court was lacking in jurisdiction. And while the 14th Amendment does not require that a state shall provide for an appellate review in criminal cases (citing cases), it is perfectly obvious that where such an ap-

peal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment."

To like effect is the decision of this Court in *Saunders* v. *Shaw*, 244 U. S. 317.

As stated in *United States* v. *Henson*, 21 F. Supp. 616, 618 (DC ED Pa. Maris, J.):

"The due process of law to which the Fourteenth Amendment refers is not confined to the proceedings and judgment of the trial court. It includes also proceedings on appeal in the state court."

Conclusion.

Petitioner therefore respectfully submits that for each of the reasons relied on for allowance of the writ of certiorari, as set out on pages 11 and 12 of the foregoing Petition, this case is one in which a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 252

LAFAYETTE M. GRAY (ALSO KNOWN AS L. M. GRAY), PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 448–460) is reported at 174 F. 2d 919. The District Court's opinion denying petitioner's motion for judgment of acquittal (R. 372–380) is not reported.

JURISDICTION

The original judgment of the Court of Appeals, entered April 18, 1949 (R. 460), was modified on June 6, 1949 (R. 489), following the filing and denial of a petition for rehearing on behalf of the Government (R. 461–486). Petitioner's petition for rehearing with respect to the modi-

fied judgment of June 6, 1949 (R. 491–510), was denied July 14, 1949 (R. 511). The petition for a writ of certiorari was filed August 12, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether the acquittal of petitioner on several specifications of misbranding and his conviction on others contained in the same counts, followed, on appeal by petitioner, by the reversal of the conviction by the Court of Appeals with directions to the District Court to discharge petitioner, and the subsequent modification by the Court of Appeals of its judgment so as to direct the District Court to grant a new trial, subjects petitioner to double jeopardy or otherwise prejudices his legal rights.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, provides in pertinent part:

> SEC. 201 [21 U. S. C. 321]. For the purposes of this Act—
>
> * * * * *
>
> (k) The term "label" means a display of written, printed, or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this Act that any word, statement, or other information appear on the label shall not be considered to be complied with un-

less such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.

* * * * *

(m) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

SEC. 301 [21 U. S. C. 331]. The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

SEC. 303 [21 U. S. C. 333]. (a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; * * *

SEC. 502 [21 U. S. C. 352]. A drug or device shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.

* * * * *

(e) If it is a drug and is not designated solely by a name recognized in an official compendium unless its label bears (1) the common or usual name of the drug, if such there be * * *.

(f) Unless its labeling bears (1) adequate directions for use * * *.

STATEMENT

A criminal information in four counts was filed in the United States District Court for the District of Minnesota charging petitioner with violations of the Federal Food, Drug, and Cosmetic Act. The jury found petitioner not guilty on Count II, and the District Court dismissed Count IV during the trial. The issues raised on this petition for certiorari, therefore, relate to Counts I and III. Each of these counts (R. 1–2, 3–4) charged petitioner with violating Section 301 (a) of the Act by introducing and delivering for introduction into interstate commerce a misbranded drug. The drug, called "Powdr-X", was alleged in Count I to be misbranded within the meaning of (1) Section 502 (a), in that statements in a letter which accompanied the drug were false and misleading; (2) Section 502 (e) (1), in that its label failed to bear the common and usual name of the drug; and (3) Section 502 (f) (1), in that its labeling failed to bear adequate directions for use. The letter referred to in this count was addressed to the purchaser, recommended that Powdr-X be mixed with vaseline, and concluded by stating, "In fact it is an ointment that is splendid for almost any infection, abrasions, or ulcers" (R. 2, 43–44). It was the Government's position that this letter represented

and suggested that Powdr-X would be efficacious in the cure, mitigation, and treatment of almost any infection, abrasions, and ulcers, whereas in fact it would not be so efficacious, and that the statements, therefore, were false and misleading. In Count III, a different shipment of Powdr-X was alleged to be misbranded in a similar manner under Section 502 (a) and (e) (1), but there was no charge of misbranding under Section 502 (f) (1). The accompanying letter to the purchaser involved in this count (R. 113–114) stated: "We believe we have a good reason for expecting Powdr X to correct ulcers of the stomach. * * * Gas pains that usually accompany ulcers of the stomach should subside in a week or ten days." It was alleged that these statements represented and suggested that Powdr-X would be efficacious in the cure, mitigation, and treatment of ulcers of the stomach, whereas in fact it would not be so efficacious, and that the statements, consequently, were false and misleading.

Petitioner filed a motion to dismiss the information on the ground that each count charged more than one offense (R. 6–7). This motion was denied, but the District Court directed that Counts I and III be amended by adding at the conclusion of each the following statement: "it being the intent and purpose of the Plaintiff to charge hereunder only one interstate shipment and offense under the Food, Drug and Cosmetic Act" (R. 9).

In his instructions to the jury, the trial judge read to them forms of verdict which he had prepared for their use. In respect of Count I, the form of verdict was (R. 347–348):

> We, the jury in the above-entitled action, find the defendant, as charged in the first count of the Information, (blank) guilty of misbranding by introducing into interstate commerce a drug, to-wit, Powdr-X, with a label which was false and misleading; (blank) guilty of misbranding by introducing a drug, to-wit, Powdr-X, in interstate commerce which was not designated solely by a name registered in an official compendium and that its label failed to bear the common name of the drug, to-wit, pumice; (blank) guilty of misbranding by introducing into interstate commerce a drug, to-wit, Powdr-X, which failed to bear adequate directions for use.

A similar form of verdict on Count III was submitted to the jury (R. 348–349):

> We, the jury in the above-entitled action, find the defendant, as charged in the third count of the Information, (blank) guilty of misbranding by introducing into interstate commerce a drug, to-wit, Powdr-X, with a label which was false and misleading; and (blank) guilty of misbranding by introducing into interstate commerce a drug, to-wit, Powdr-X, which was not designated solely by a name recognized in an official compendium and that

its label failed to bear the common name of the drug, to-wit, pumice.

After the jury had retired to deliberate, government counsel suggested to the court that the word "labeling" be substituted in the forms of verdict for "label" in order to conform the forms to the charges of the information that the letters accompanying the drugs (which constituted labeling within the meaning of the Act (sec. 201 (m)), as distinguished from the labels themselves, contained representations which were false and misleading. Petitioner's counsel objected to any revision of the forms and the court rejected the suggestion, stating, "The jury can't possibly be misled by the form of verdict in so far as the term 'label' is concerned. Certainly I went into great detail, and at your suggestion, after the jury was charged, called their attention to the fact that the labeling was not only the labeling which appeared by way of letter which accompanied the shipment, but was that which was attached to the carton. I can't conceive that there is anything but a rather captious objection to the term 'label' as I used it in the verdict. Of course my only purpose in using it was to identify the count—the various misbranding counts that appear in the respective counts, so that they could intelligently follow the instructions and intelligently return a verdict. I don't think there is any real foundation for that." (R. 353–356.)

The jury found petitioner guilty on the first specification of misbranding set forth in the forms of verdict for Counts I and III (false and misleading representations) and not guilty on the remaining specifications in those counts (R. 11, 12).

Thereafter, petitioner filed a motion (R. 366–369) and an amended motion for judgment of acquittal on the ground, *inter alia*, that the jury's finding of guilty of misbranding in the "label," as stated in the form of verdict for each of Counts I and III, "constitutes a finding by the jury that the defendant was guilty of the offense of misbranding solely by a means with which the defendant was not and is not charged in the Information" (R. 370–371). In an opinion rejecting this contention (R. 372–380), the court said that "a consideration of the entire situation would indicate that the motion for judgment on this ground seems to be extremely hypercritical and captious" (R. 374). The court pointed out that in the instructions to the jury reference was made to the letters involved in Counts I and III and to the Government's contention that they constituted labeling, and that the jury were instructed that if they should find that the letters did accompany the drugs, and so constituted labeling, then the jury should determine whether such labeling was false and misleading. "Obviously," the court said, in the light of these instructions, "there was no possibility that the

jury did not understand that when the Court used the term 'label,' it was with reference to the letter." (R. 374–375.) The court also pointed out that "Days were spent in Court in endeavoring to decide whether or not the representations or statements made in these letters constituted a labeling which was false and misleading," and that "There was no contention that the label affixed to the carton itself contained any false and misleading statements. The only label or labeling which contained any false and misleading statements, according to the Government's evidence, was that which was set forth in the letters." The court concluded that "to suggest now that the forms of verdict, to which no objection was made by the defendant and which the defendant in fact approved by his objection to any change therein, constituted any prejudice to the defendant is a sheer afterthought and seems highly hypercritical." (R. 377.)

Judgment was entered on the verdicts and petitioner was sentenced generally on Counts I and III to pay a fine of $1,000, together with the costs of prosecution (R. 380–381).

On appeal, the Court of Appeals reversed the judgment on the grounds (1) that the District Court erred in requiring the jury to return a special verdict as to each specification of misbranding alleged in the counts submitted to them and (2) that the verdicts of guilty on the specifications in the forms of verdict of misbranding

"with a label which was false and misleading" were fatally defective in that, while false and misleading representations in either a label or labeling constitute misbranding, Counts I and III alleged misbranding, in this respect, only in the labeling, i. e., in the letters accompanying the shipments involved in those counts, with the result that the verdicts were not responsive to the charges (R. 448–460). The court ordered that the cause be remanded with directions to "discharge the accused" (R. 460), but later, after the Government had filed a petition for rehearing (R. 461–486), the opinion and judgment were "corrected" so as to "grant a new trial" (R. 489).

ARGUMENT

Petitioner contends (Pet. 17–26) that "since 'there was no verdict of guilty of false labeling within the charge of the information,' and since the petitioner 'was put in jeopardy on the charges of the several counts of the information and the jury was discharged without having rendered verdicts of guilty responding to the charges' (as stated in the opinion of the Court of Appeals * * *), and since the effect of such discharge of the jury 'is equivalent to acquittal' and since 'any further attempt to prosecute would amount to a second jeopardy, as to the charge with reference to which the jury has been silent' (as stated by this court in the *Selvester* case [170 U. S. 262, 269]), the petitioner

should have been discharged ir accordance with the original Opinion of the Court of Appeals" (Pet. 24). We submit that this contention is as "hypercritical and captious" as the District Court found petitioner's motion for judgment of acquittal to be.

The information charged petitioner with having violated Section 301 (a) of the Act, which prohibits the introduction or delivery for introduction into interstate commerce of a misbranded drug. The Court of Appeals properly held that there was no error in the conclusion of the District Court that the charge in each count was single and not duplicitous, since the offense charged was the introduction and delivery for introduction into interstate commerce, in violation of Section 301 (a) of the Act, of a drug which was misbranded in several particulars under Section 502 (R. 451).

Since each count designated the particulars in which the offense charged under Section 301 (a) had been committed, the jury was given the opportunity, by the forms of verdict submitted by the District Court, to determine whether the Government had proved each specification of misbranding. This Court has approved the use of special verdicts in treason cases (*Haupt* v. *United States,* 330 U. S. 631, 641; *Cramer* v. *United States,* 325 U. S. 1, 36), and, notwithstanding the opinion of the Court of Appeals, we see no reason why a special verdict

is not appropriate in a case of this kind. In any event, the forms of verdict submitted to the jury in no way prejudiced petitioner, but rather aided him. It is well settled that a charge of misbranding is established if the evidence proves any one of the representations made to be false. *United States* v. *One Device, etc.*, 160 F. 2d 194, 200 (C. A. 10). If the forms of verdict had not been submitted to the jury, they could have found petitioner guilty on each count on the basis of proof by the Government which sustained any one of the specifications of the ways in which the offense charged had been committed. The forms of verdict utilized permitted the jury to find specifically that petitioner had or had not violated the Act in designated respects.

Petitioner cannot claim jeopardy with respect to the charges on the basis of which he was convicted. For it is well established that when jeopardy has attached, if a defendant by his own act causes the verdict to be set aside, by that action he waives his constitutional protection against being twice put in jeopardy. E. g., *United States* v. *Ball*, 163 U. S. 662, 672; *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 462. Petitioner asserts (Pet. 24–25) that he did not waive his defense of former jeopardy since he withdrew his motion for a new trial made in the District Court and, in his brief filed in the Court of Appeals, stated that he reserved "his right to not again be tried or put

in jeopardy on or for any of the charges on which he was once tried and found 'not guilty' by the jury or on which the verdicts of the jury were silent." We are not aware of any authority, however, which holds that a defendant, by a mere assertion such as that made by petitioner, may limit his waiver of jeopardy when he appeals from a judgment against him. See *Trono* v. *United States,* 199 U. S. 521, 533. It is clear, also, that the findings of the jury that petitioner had not committed the offenses charged in Counts I and III in some of the particulars alleged did not place him in jeopardy with respect to the remaining specification, to-wit, the introduction into interstate commerce of a drug that was misbranded in that its labeling was false and misleading.[1]

At worst, the discrepancy between the use of the word "label" in the forms of verdict and the charge of misbranding in the labeling has resulted only in an imperfect verdict—a verdict which on its face neither establishes nor is inconsistent with the guilt or innocence of the defendant of the crime charged. Such a verdict is one upon which no legal conclusion can be reached and a new trial should properly be ordered.

[1] The specifications as to which petitioner was found not guilty would, of course, be eliminated on a new trial, either by way of amendment of the information (see Rule 7 (e), F. R. Crim. P.) or withdrawal by the court. And since only the specification of misbranding by false and misleading labeling remains, the question as to the use of special verdicts is no longer in the case.

United States v. *Buzzo,* 18 Wall. 125, 129;[2] *Houston* v. *United States,* 5 F. 2d 497 (C. A. 5); *United States* v. *Watkins,* Fed. Cas. No. 16, 649, 28 Fed. Cas. 419, 479.

The cases upon which petitioner relies to support his contention are readily distinguishable. They involved situations where the jury's verdict was silent as to one or more counts of an indictment (*Selvester* v. *United States,* 170 U. S. 262; *Dealy* v. *United States,* 152 U. S. 539; *State* v. *Yow,* 227 N. C. 585, 42 S. E. 2d 661), or as to a constituent element of the offense charged (*State* v. *Yow, supra;* cf. *Houston* v. *United States, supra*) or found the defendant guilty of an offense not known to the law (*Commonwealth* v. *Komatowski,* 347 Pa. 445, 32 A. 2d 905) or different from the offense charged (*Walters et al.* v. *Commonwealth,* 44 Pa. 135; *Ex Parte Muse,* 56 Okla. Crim. 232, 37 P. 2d 317; *People* v. *Arnarez,* 68 Cal. App. 645, 230 P. 193; *State* v. *Ward,* 147 La. 1083, 86 So. 552).

In the instant case, the jury's verdict was not silent in respect of the charge of misbranding by

[2] Petitioner cites this case as supporting his contention. Pet. 21. He relies on the concluding language of the opinion in which this Court said the case must be dismissed. The case came before the Court on a certified question. The Court said that since the verdict was silent as to an element of the offense it would be unavailing to decide the question and that an imperfect verdict must be set aside and a venire de novo, i. e., a new trial, ordered. The dismissal was of the case as it stood before the Court, not the information.

making false and misleading representations in the labeling, nor did the jury find petitioner guilty of an offense not charged. For, as the district court pointed out in its opinion denying petitioner's motion for judgment of acquittal, the evidence at the trial on this aspect of the case was addressed to the question whether the representations contained in the letters to the purchasers of the drug were false and misleading, there was no issue as to whether the labels themselves contained false and misleading statements, and the instructions to the jury referred to the letters and to the Government's contention that they constituted labeling and directed the jury to determine whether the statements contained in them were in fact false and misleading as alleged in the information. In these circumstances, it is clear, as the district court concluded, that the jury's findings of guilty on the first specification of misbranding as set forth in the forms of verdict submitted to them were tantamount to findings that the letters were false and misleading and, consequently, that the verdicts were responsive to the corresponding charges of Counts I and III. We think the Court of Appeals was wrong in setting aside the judgment and verdicts because of the district judge's oversight in using the word "label" instead of "labeling" in the forms of verdict, but assuming that this imperfection vitiated the verdicts, petitioner is not

entitled to the windfall he seeks of immunity from retrial for offenses of which he has been found guilty.[8]

[8] Petitioner's further complaint (Pet. 26–32) against the affidavit of the Assistant United States Attorney attached to the Government's petition for rehearing in the Court of Appeals (R. 487–488) and his assumption that this affidavit influenced the court to modify its judgment so as to grant a new trial, misconceives the relevance of the affidavit to that action of the court and to the question of former jeopardy which petitioner claims the modification evoked. This affidavit, and the rebuttal affidavit of petitioner's counsel in support of petitioner's application for reconsideration of the modified judgment (R. 504–507), were addressed to the question whether the suggestion to the district court that special verdicts be called for was made by the Government or the defense. They were relevant only to the issue of the propriety of the district court's action in requiring the jury to return special findings as to each specification of misbranding. The Court of Appeals decided this issue against the Government and it is obvious that the Government's petition for rehearing did not persuade it to change its decision, for the petition was denied. The modification of the judgment involved only the question whether the discrepancy between the charges of misbranding in the labeling and the findings of guilty of misbranding in the label precludes a new trial. As we have shown, the Court of Appeals was right in its ultimate decision that petitioner has no standing to claim former jeopardy.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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Petitioner's Reply Brief

Point 1: petitioner (defendant) did not object to twice-requested revision of the forms of the verdicts, but, in effect, joined in the request when made the second time.

As a part of its "STATEMENT", appearing on page 7 of its Brief filed September 22, 1949, respondent erroneously says:

> "Petitioner's counsel objected to any revision of the forms (of the verdicts)[1] . . ."

As demonstrated hereinbelow, the fact is, that petitioner's counsel did *not* object to a revision of the forms of the verdicts.

Insofar as concerns the *multiple*[2] forms of each of the verdicts, petitioner's counsel took specific and timely exception immediately upon the completion of the trial judge's charge to the jury (R.p. 350, and see also Court of Appeals' Opinion at R.p. 455, lines 5 et seq).

Insofar as concerns the trial court's use of the words "label" instead of the word "labeling" in the typed verdict-forms[3], by reason of which the jury brought in

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[1] all parenthetical interpolations within quotations and all emphasis within quotations, and all footnotes referenced to quotations, are supplied by petitioner's counsel, unless otherwise noted

[2] i. e. that aspect of the verdict-forms which required the jury to find defendant guilty or not guilty *more* than once on each count;—whereas the District Court in its pre-arraignment decision (R.pp. 8, 9) and the Court of Appeals in its Opinion (R.p. 451, lines 21 to 32) held that the counts were not multiple or duplicitous in character (namely, both courts held that the *charge* in each count was *single* and not duplicitous)

[3] Counsel for (defendant) petitioner were *not* given any opportunity to read the typed verdict-forms prior to the time that such typed verdict-forms were handed to the jury at the conclusion of the charge, nor prior to the discharge of the jury. On the other hand, the Government's attorney who (a week prior to the charging of the jury) had suggested to the Court the improper multiple form of the verdicts (R.pp. 275-276) had obtained copies of the typewritten verdict-forms at least as early as immediately after the jury retired with such verdict-forms (R.p. 353)

a verdict of "guilty" as to an offense *not* charged in the Information, petitioner's counsel did *not* "object to any revision of the forms (of the verdicts)" as *erroneously* suggested on page 7 of respondent's Brief because, as shown by the record (R.pp. 354-355), the *only* objection (on the part of petitioner's counsel) was to the recalling of the jury after it had been deliberating for some three hours, and such objection was solely on the ground that no one could tell how near the jury was to filling in the blank spaces in the verdict-form and signing the verdict, and no one could tell whether by such recalling the jury on the initiative of the Government's attorney or on the initiative of the Court may not have some implications (in the jury's mind) foreign to the issues (R.pp. 353-356).

The use of the word "label" in those parts of the verdict-forms on which the jury later made a "guilty" return[1], went unnoticed by defendant's (petitioner's) counsel[2] and assertedly *also by the Government's attorney*[2] during the oral reading (R.pp. 347, 349) of the verdict-forms to the jury and during the defendant's subsequent objections (R.p. 350) to the multiple character of the verdict-forms read.

The Government's attorney later (R.p. 353) gave credit to a Mr. Goding[3] for calling the attention of the Government's attorney to the distinction between "label" and "labeling" presumably during the course of or immediately after the judge's charge to the jury (and before the jury retired). The Government's attorney, in turn, then called the Court's attention to this distinction (R.p. 351) *before the typed verdict-forms were handed to the jury.* Defendant's counsel did *not* then object to this

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[1] while making a "not guilty" return on other parts of the same verdict-forms *as to the same counts*

[2] and presumably was likewise *not* noticed by the trial judge even though he presumably gave his oral reading directly from his typed verdict-forms which were then handed to the jury directly upon the conclusion of the Court's charge

[3] *not* of counsel, but who came in to the courtroom toward the end of the trial and who was apparently connected with some Government department in Washington (R.p. 354)

distinction being made between "label" and "labeling" (R.p. 351). Yet, notwithstanding this, the Court did *not* change the verdict-forms, in this respect, although its attention was called to the matter before such verdict-forms were handed to the jury and before the jury retired and while the Court still had ample opportunity to change the verdict-forms before the jury retired.

After the jury had deliberated for about three hours, the Government's attorney again called this *same* matter to the Court's attention (in chambers). This time the Government's attorney suggested to the Court, however, that when he (the Government's attorney) had earlier called the same matter to the Court's attention before the jury retired (R.p. 351), he (the Government's attorney) didn't fully appreciate the significance of the matter as had been brought to his attention by Mr. Goding:

> **"When I mentioned* the matter of the label and the labeling at the conclusion of your charge*, I didn't have in mind the significance of it as it was brought to my attention by Mr. Goding;** and we had the reporter read back what was said to the jury with respect to these forms of verdict and we got copies of the forms which were placed with the jury. It appears (i. e. from a reading, by Messrs. Hansen and Goding, of their copies of the verdict-forms) that the one, for instance the Feltenberger, it should have read: 'To-wit, Powdr-X, with labeling', instead of 'with a label which was false and misleading.' And then further down, **Mr. Goding felt,** further down where . . . in the Evans matter there of course is only the question of whether the word 'label' or 'labeling' should be used, the suggestion being that it should have read, 'to-wit, Powdr-X, with labeling,' instead of 'a label' 'which was false or misleading,' instead of 'false and misleading.'
>
> THE COURT:—Did you read your information?
>
> MR. HANSEN:—I didn't prepare the information and I have not checked it with this.

*this has reference to Mr. Hanson's remarks on Record page 351

> THE COURT:—The information says false and misleading. I merely followed the language of your own information and **did so intentionally** because I felt I had no other alternative in the way you had framed your information" (R.p. 353).

Far from having "objected to any revision of the forms (of the verdicts)" as *erroneously* suggested on page 7 of respondent's Brief, petitioner's counsel, on the contrary, stated to the trial judge that if the jury, *on its own initiative,* came back for further instruction, *the requested change in the form of the verdicts would be in order* (R.p. 355, lines 29-32); petitioner's counsel thereby, in effect, joining the Government's attorney in this *second** request for a change, providing only that an opportunity presented itself for effecting such change without disturbing the jury in its deliberations (at the instance of either court or counsel). Such an opportunity did present itself as shown hereinbelow.

Thus, after being out for more than 23 hours, the jury did (on its own *initiative*) return to the Court for further instructions (R.p. 356) and the Court further addressed the jury (R.pp. 361, 363) but did *not* amend the forms of verdicts *nor* further instruct the jury concerning the forms of the verdicts (as the Court had theretofore been adequately requested to do (R.pp. 353-356).

Therefore, the statement on page 7 of respondent's brief that

> "Petitioner's counsel objected to any revision of the forms (of the verdicts)"

is not a fair reflection of the facts;—the facts being as above set forth and as can be seen from the parts of the record to which reference is made above. Moreover, the improper multiple character of the verdict-forms was clearly suggested to the Court (and requested by) the Government's attorney (R.pp. 275-276) 7 days before the jury was instructed.

* the first request (R.p. 351) having been made before the jury retired

On page 9 of its brief in opposition, respondent quotes from the District Court's opinion (R.p. 377) denying defendant's post-verdict motion (R.p. 364-369) for judgment of acquittal, wherein the District Court also erroneously stated that defendant had objected to any change in the forms of the verdicts, whereas, as shown above, defendant, if anything, approved such change in the form of verdicts if an opportunity therefor presented itself upon the jury's return for further instructions on its own initiative, which opportunity did present itself without the Court availing itself of such opportunity and without the Court making any such change in the form of the verdicts.

Moreover, the Court of Appeals, in its opinion (at R.pp. 457 to 460, and particularly on p. 460) reached a conclusion diametrically opposite to that reached by the District Court as expressed, inter alia, in that part of the District Court's opinion which is quoted on page 9 of the respondent's brief in opposition to petition for writ of certiorari;—the Court of Appeals expressly reversing the District Court on the matter so quoted on page 9 of respondent's brief (see also appellate opinion at R.pp. 459-460).

Point 2: Jury's verdicts

a) were silent in respect to charge of misbranding by marking false and misleading representations in the "labeling" (i. e. in the letters) as charged in Counts I & III of the Information, and

b) did find petitioner guilty of an offense not charged, namely, the jury's verdicts found petitioner guilty of such "misbranding" in the "label", and such "misbranding" in the "label" was not charged in any Count of the Information.

On pages 14 and 15 of respondent's brief in opposition to petition for writ of certiorari, respondent *erroneously* states:

> "In the instant case, the jury's verdict was not silent in respect of the charge of misbranding by making false and misleading representations in the labeling, nor did the jury find petitioner guilty of an offense not charged."

However, this is likewise contrary to the fact because, as the Court of Appeals correctly held (R.pp. 459-460), in the instant case the jury's verdict *was silent* in respect of the charge of misbranding by making false and misleading representations in the *labeling,* namely in the letters which were only things charged in the Information to contain any false and misleading representations;—the *label,* found by the jury to have contained false and misleading representations, was *not* charged in the Information to contain *any* false and misleading representations.

The jury therefor did find the defendant guilty of an offense *not* charged, as the Court of Appeals correctly found (R.p. 459).

Point 3: The misleading affidavit by the Government's attorney, filed with the Government's Petition for Re-Hearing in the Court of Appeals, as to facts dehors the record and contrary to the record, must be presumed to have influenced the Court of Appeals to change its judgment from "discharge the accused" to "grant a new trial", in the absence of any statement to the contrary by the Court of Appeals.

In the extensive footnote on page 16 of its Brief in opposition to the petition for writ of certiorari, respondent presumably in response to *Question 3** on page 10 of the petition and *Argument-Point 2** on pages 26 to 32 of petitioner's Brief, unwarrantedly suggests that the Court of Appeals was not influenced by the factually misleading affidavit (R.pp. 487-488) of the Government's attorney accompanying Government's petition for rehearing in the Court of Appeals (see the affidavit of defendant's attorney at R.pp. 504-507 on defendant's Petition for Rehearing at R.pp. 491-503).

* not otherwise answered in respondent's brief

Petitioner's counsel respectfully submits that in the absence of any statement to the contrary by the Court of Appeals, it must be presumed that the Court of Appeals *was* influenced by the misleading affidavit of the Government's attorney;—because the fact is that while (*in form*) denying the Government's petition for rehearing, the Court of Appeals gave the Government substantially the relief which the Government asked for on its petition for rehearing and, in so doing, the Court of Appeals not only made serious errors of law, as pointed out in the Petition for Writ of Certiorari and in the Brief in support thereof, but the Court of Appeals thereby also created an irreconcilable conflict between its unaltered opinion and conclusions (R.pp. 448-460) of April 18, 1949 and the *end-result* directed by its subsequent modifying order (R.p. 489) of June 6, 1949, namely, the plain language of its opinion and conclusions (R. pp. 448-460) and the authorities correctly relied upon by the Court of Appeals, *required* a discharge of the defendant, which its *original* opinion (R.pp. 448-460) and judgment (R.p. 460) granted, whereas its modifying order (R.p. 489) withdraws such theretofore correctly directed *discharge* and, instead, erroneously subjects defendant to a new trial and hence to double jeopardy in respect to counts on each of which the jury made one or two *"not guilty"* returns and in respect to which the jury did *not* render *any* verdict of "guilty" (of any offense charged in the count), as pointed out in the unaltered opinion of the Court of Appeals (R.p. 459, last 4 lines, and R.p. 460, first 2 lines).

Point 4: Authorities relied upon in respondent's Brief in opposition to the Petition for Writ of Certiorari, do not support respondent's contentions in opposition to the Petition.

Point 4-a: Special verdicts not permissible in criminal cases (and the Court of Appeals correctly held that special verdicts are not permissible in criminal cases).

On page 11 of its opposing Brief, respondent erroneously suggests that "this court has approved the use of

special verdicts in treason cases" and in support of such erroneous statement respondent cites this Court's decisions in *Haupt* v. *United States* (330 U.S. 631, 641) and *Cramer* v. *United States* (325 U.S. 1, 36).

However, in neither the *Haupt* case nor in the *Cramer* case was there any special verdict. On the contrary, in each of these two cases there was nothing but a general verdict.

The only statement which this Court made in respect to a special verdict was in the footnote in the *Haupt* case at 330 U.S. 641, wherein this Court said

> "If acts were pleaded in separate counts, or a special verdict were required as to each overt act of a single count, the conviction could be sustained on a single well-proved act. As the acts were here pleaded in a single count, and the jury were instructed that they could convict* on any one, we would have to reverse if any act were insufficient or insufficiently proved." (330 U.S. 641)

It is perfectly clear that this Court's reference to the alternative possibility "**If** . . . a special verdict were required as to each overt act of a single count", was dictum, because no such special verdict was involved in the *Haupt* case nor in the earlier *Cramer* case to which this Court's aforesaid footnote refers.

So far, the Government's attorneys have been unable to cite a *single* case in which a special verdict in a criminal case was in fact approved. On the contrary, however, it is the well-established rule that special verdicts are not authorized in criminal cases, in the Federal Courts (*Anderson* v. *United States,* 275 F. 677; CA-7).

Point 4-b: *Haupt* v. *U. S.* and *Cramer* v. *U. S.*, relied upon by respondent, support petitioner's position on the petition at bar.

Furthermore, *Haupt* v. *United States* and *Cramer* v. *United States,* supra, relied upon by respondent on page

* on a general verdict

11 of its Brief in opposition, far from supporting respondent's position, indeed, support petitioner's position that it was entitled to a discharge (as the original decision and judgment of the Court of Appeals at first correctly directed) because, as pointed out in the *Haupt* case and the *Cramer* case, if several overt acts, offenses or violations are charged in one Count, and any one of such overt acts, offenses or violations are either insufficient or not sufficiently proved, a guilty verdict on such count cannot be sustained even though the other overt acts, offenses or violations included within the same count were sufficient and were adequately proved.

In the case at bar it would therefore be impossible to re-try petitioner on Counts I & III (here involved) because as to each of these Counts the jury made a "not guilty" return as to one or two of the offenses or violations included in the Count and was silent as to the other offense or violation included in the Count, and such silence is equivalent to acquittal under this Court's decisions in *Selvester* v. *United States* (172 U.S. 262, 269) and *Dealy* v. *United States* (152 U.S. 539, 542). Hence, even if the law were not as this Court has expressly held in the *Dealy* case and the *Selvester* case and if this Court should expressly overrule the *Dealy* case and the *Selvester* case, so as to authorize a new trial in respect to the offense or violation in Counts I & III as to which the jury's verdict was silent, it would *not* be possible to re-try petitioner under Counts I & III because, as pointed out by this Court in the *Cramer* and *Haupt* cases, supra, it would not be possible to know whether the jury's general verdict* on either Count I or Count III was or was not based upon the acts, offenses or violations included in these Counts as to which the defendant (petitioner) had been found *not guilty* on the first trial, and as to which acts, offenses or violations defendant certainly could not be re-tried in

* the only kind of verdict which the Court of Appeals, in the case at bar (and other Federal courts) have uniformly and correctly held to be the only form of verdict permissible in a criminal case

the face of the *"not guilty"* verdicts returned on the first trial.

Here again, respondent's Brief disagrees with the opinion of the Court of Appeals in the case at bar (see last two lines on page 11 and first line on page 12 of respondent's Brief).

Point 4-c: A judgment of conviction could not be sustained on a general verdict of "guilty", where the count charged several distinct overt acts or violations and one of such acts or violations is not established.

The case of *United States* v. *One Device, etc.,* 160 F. 2d 194, 200 (CA-10) does not support respondent's contention for which it is cited, namely that a charge of misbranding of the Count is established if the evidence proves that any *one* of the *several* statutorily distinct kinds of misbranding charged in such Count is established. Thus, the case of *United States* v. *One Device, etc.* was a libel action aimed solely at the seizure and condemnation of two certain devices and was tried to the Court without a jury, and the Court, as is proper in such cases tried without a jury, made special findings of fact and conclusions of law. However, the case of *United States* v. *One Device, etc.* does not support the proposition that a single Count for misbranding is sustained in the evidence proves any *one* of the *several* statutorily separate and distinct kinds of misbranding included in the one Count (tried to a jury) without proving all acts or violations included in such Count.

Moreover, if the case of *United States* v. *One Device, etc.* had held that a single Count of misbranding is sustained if the evidence proves any *one* of the *several* statutorily separate and distinct kinds misbranding included in the Count, then such decision would have been clearly in conflict with this Court's decisions in *Haupt* v. *United States* and *Cramer* v. *United States,* supra.

Point 4-d: Constitutional protection against being twice put in jeopardy is not waived by defendant's appeal solely for acquittal or discharge (from a judgment of conviction and from the trial court's decision denying defendant's sole post-verdict motion for judgment of acquittal).

Neither the case of *Ball* v. *United States* (163 U. S. 662, 672) nor the case of *Louisiana ex rel. Francis* v. *Resweber* (329 U.S. 459, 462) cited on page 12 of respondent's Brief in opposition, supports respondent's contention for which it is cited, namely that petitioner has waived his constitutional protection against being twice put in jeopardy.

In *Ball* v. *United States,* three defendants (Millard F. Ball, John C. Ball and Robert E. Boutwell) were tried together upon an indictment against them. The jury returned a verdict of "guilty, as charged in this indictment" against John C. Ball and Robert E. Boutwell, and found Millard F. Ball "not guilty". After sentence, John C. Ball and Robert E. Boutwell *appealed* and prayed "that the judgment be reversed and the cause remanded *for a new trial*", because of a fatal defect or deficiency in the indictment, for which reason they contended that "there was no legal indictment". This Court, upon writ of error, reversed the judgment against John C. Ball and Robert E. Boutwell because the indictment was fatally defective and

> "remanded the cause with directions to quash the indictment and to take such further proceedings in relation to them (i.e. John C. Ball and Robert E. Boutwell) as to justice might appertain. Ball *v.* U.S., 140 U.S. 118, 136 and 35 L.Ed. 377, 385".

Thereupon the trial court dismissed the indictment and the grand jury returned a new and sufficient indictment against *all three* defendants. Millard F. Ball thereupon filed a plea of former jeopardy and former acquittal and for an order of the trial court for his discharge upon the former indictment. The defendants John C. Ball and Robert E. Boutwell filed a plea of former jeopardy by reason of their trial and conviction upon their former

indictment and the dismissal of that indictment. The trial court overruled both these pleas, whereupon all three defendants then severally pleaded "not guilty". The defendants introduced in evidence the record of the proceedings upon the former indictment and the trial judge instructed the jury to find against both pleas of former jeopardy, because the trial court decided that the former indictment was insufficient; whereupon the second jury returned a verdict of "guilty" against all three defendants and the court imposed sentence upon all three defendants.

This Court, in *Ball* v. *U. S.*, 163 U.S. 662 *reversed* the lower court's decision *as to Millard F. Ball* and held that his former acquittal *did* constitute "former jeopardy" in relation to the second indictment and second trial, notwithstanding the fact that the first indictment was fatally deficient and insufficient to support any verdict or judgment against defendants;—Millard F. Ball not having appealed from the first judgment nor asked for new trial.

Therefore, this Court's statement in *Ball* v. *United States* 163 U.S. 662, 672, relied upon by respondent, related *solely* to the defendants John C. Ball and Robert E. Boutwell who had, on their first appeal, from the first judgment prayed "that the judgment be reversed and the cause remanded *for a new trial*".

Of course, it goes without saying that a defendant who appeals *for a new trial*, and then gets a new trial, cannot plead "former jeopardy".

In the case at bar, defendant did *not* ask for a new trial. On the contrary, on page 16 of petitioner's brief filed in the Court of Appeals on December 24, 1948, under the heading of "relief prayed for", petitioner said:

> "On this appeal, appellant prays for reversal of the judgment of the lower court as to Counts I and III of the Information; and that appellant be granted judgment of acquittal, or that the action be dismissed in accordance with appellant's motion filed December 18, 1947 (R.pp. 6, 7), and that he be discharged" (R.p. 499).

and petitioner's brief in the Court of Appeals, on page 51, under the heading of "Conclusion", stated:

> "For the reasons above stated, it is respectfully submitted that the judgment of the lower court should be reversed; that the defendant is entitled to judgment of acquittal or to have the action dismissed in accordance with his motion for dismissal which was denied by the lower court and, in either event, that the defendant is entitled to be discharged.
>
> "In taking this appeal, the defendant does not waive and expressly reserves the right to not again be tried or put in jeopardy on or for any of the charges on which he was once tried and found 'not guilty' by the jury or on which the verdicts of the jury were silent" (R.p. 499).

In the case of *Louisiana, ex rel. Francis* v. *Resweber* (329 U.S. 459, 462) the only question involved was whether the state's failure to carry out the death sentence upon the date legally fixed therefor, because of some defect in the state's execution equipment or machinery, barred the state from carrying out its sentence at a later date, on the theory of "former jeopardy" or "double jeopardy". There is clearly no such situation or any analogous situation in the case at bar.

The case of *Trono* v. *United States* (199 U.S. 521, 533) which was *not* cited in the Government's briefs in the Court of Appeals either on the original hearing or on its petition for rehearing (notwithstanding its argument on the question of waiver of constitutional protection against double jeopardy), likewise does not support respondent's contention,* for which that case is now cited for the first time, namely, that petitioner has waived the constitutional protection against double jeopardy by taking an appeal.

While this Court's opinion in *Trono* v. *United States* does not say, in so many words, that the defendant Trono

* rejected by the Court of Appeals in the case at bar at R.pp. 459-460

appealed for a new trial, this is what undoubtedly must have happened. At least, in the absence of any indication that defendant's appeal in the *Trono* case was not for the purpose of obtaining a new trial, it cannot be assumed that it was not for the purpose of getting a new trial that Trono took the appeal, and it is only upon that assumption that the *Trono* case could in any way support respondent's contention of waiver of the constitutional protection against double jeopardy.

Moreover, in the *Trono* case, defendant *had been found guilty of an offense charged,* whereas in the case at bar *petitioner has not been found guilty of any offense charged* (R.p. 460), and in the *Trono* case it was a matter of the *varying degrees* of the *same* offense, whereas in the case at bar each Count contained several separate and distinct violations which were *not* merely *varying degrees* of the same offense but were, indeed, under different sections of the statute, and, furthermore, in the case at bar, *all parts of the verdicts* (on each Count) which referred to an offense or violation actually charged in the information, were verdicts of *"not guilty"*.

Point 5: Respondent's opposition to the granting of the Petition for Writ of Certiorari is based upon respondent's reliance upon the overruled and reversed decision (R.pp. 372-380) of the District Court which denied defendant's post-verdict motion (R.pp. 364-369) for judgment of acquittal, and is further based upon respondent's disagreement with and criticism of every conclusion of law reached by the Court of Appeals in its reversing decision (R.pp. 448-460).

It will thus be seen that in addition respondent's *errors of fact* covered by foregoing *Points 1 and 2* and respondent's misapplication of authorities covered by foregoing *Points 4-a, 4-b, 4-c and 4-d,* respondent's opposition to the petition, at bar, for writ of certiorari, is based primarily (1) upon respondent's disagreement* with all

* see the following parts of respondent's Brief: from page 10, line 17 to page 11, line 6; from page 11, line 30 to page 12, line 1; from page 14, line 22 to page 15, line 30

the underlying conclusions in the decision of the Court of Appeals and (2) upon respondent's reliance* upon the decision of the District Court denying petitioner's post-verdict motion for judgment of acquittal, which decision of the District Court was *reversed.*

Thus, it now also appears from respondent's brief in opposition to the petition for writ of certiorari that the opinion of the Court of Appeals is irreconcilably in conflict with its *subsequent* modifying order directing a new trial, and that only a discharge of the accused (as first correctly directed by the Court of Appeals) can be in harmony with the otherwise correct reversing opinion of the Court of Appeals.

Hence, respondent's own brief in opposition, (1) in finding support *only* in the *reversed* decision of the District Court and (2) in finding *no* support whatever in the reversing decision of the Court of Appeals, also indicates that the petition in the case at bar is one which should be granted.

As pointed out in the Opinion of the Court of Appeals on pages 459-460 of the Record:

> "It is also argued (by the Government's attorney) that the appellant should be deemed to have waived the defects in the forms of verdict because he did not point them out to the court at the time the court delivered them to the jury. But the record shows that the court's attention was called to the defects both before the forms went to the jury and afterwards before the verdicts were arrived at. The court stated, 'The jury can't possibly be misled by the form of verdict in so far as the term "'label" is concerned.' 'I can't conceive that there is anything but a rather captious objection to the word "label" as I used it in the verdict.' As this court's study of the record has led to contrary conclusions and to holding that in consequence of the defects in the forms it

* see the following parts of respondent's Brief: page 7, lines 14-31; page 8, lines 16-31, and page 9, lines 1 to 20; page 11, lines 3-6; page 15, lines 3-26

has resulted that there was no verdict of guilty of false labeling within the charge of the information, the onus of the outcome may not be shifted to the appellant. He was put in jeopardy on the charges of the several counts of the information and the jury was discharged without having rendered verdicts of guilty responding to the charges and he is therefore entitled to have the judgment against him avoided.

Reversed and remanded with direction to set aside the judgment and discharge the accused."*

Conclusion.

Therefore it is respectfully submitted that the petition at bar should be granted.

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* the words "discharge the accused" appeared in the Court's original opinion and in its original judgment of April 18, 1948 and were replaced by the words "grant a new trial" a month and a half later, responsive upon the Government's petition (R.pp. 461-486) for rehearing and the affidavit of the Government's attorney (R.pp. 487-488)